Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2021	)	MD Docket No. 21-190
	)	
	)	

COMMENTS OF THE CONSUMER TECHNOLOGY ASSOCIATION

The Consumer Technology Association ("CTA")[1] respectfully submits these comments in response to the Federal Communications Commission's *Notice of Proposed Rulemaking* in the above-captioned docket. The Commission seeks comment on "whether [the FCC] should adopt new regulatory fee categories . . . on particular industry participants."[2] In particular, we write in response to the FCC's request for comment on the proposal from the National Association of Broadcasters ("NAB") that the Commission impose regulatory fees on "unlicensed spectrum users."[3]

CTA comprises thousands of members representing the full range of the U.S. innovation economy, and those members support the FCC's important work. Many CTA members pay FCC regulatory fees. CTA members also build, sell, and rely on unlicensed technologies. NAB's proposal that the FCC require "unlicensed spectrum users" to pay regulatory fees is contrary to

[1] As North America's largest technology trade association, CTA® is the tech sector. Our members are the world's leading innovators—from startups to global brands—helping support more than 18 million American jobs. CTA owns and produces CES®—the most influential tech event on the planet.

[2] *Assessment and Collection of Regulatory Fees for Fiscal Year 2021*, Report and Order and Notice of Proposed Rulemaking, FCC No. 21-98, MD Docket No. 21-190, ¶ 73 (rel. Aug. 26, 2021) (in relevant part, the "*Report and Order*" or the "*Notice of Proposed Rulemaking*").

[3] *Id.*; *see also* Comments of the National Association of Broadcasters at 12-14, MD Docket No. 21-190 (filed June 3, 2021) ("NAB Comments").

the Commission's longstanding approach under Section 9 of the Communications Act and adopting it would overturn years of Commission precedent. It also would raise serious administrability concerns, be impossible to implement in a non-arbitrary manner, and have significant implications for regulatory fees in contexts beyond unlicensed spectrum. Further, NAB's proposal would undermine the enormous innovation made possible by the Commission's long-running and successful approach to unlicensed spectrum. Finally, NAB's proposal overlooks that companies using unlicensed spectrum already defray Commission costs in important ways. The Commission should not adopt this unprecedented, counter-productive proposal.

I. NAB'S VAGUE PROPOSAL TO REQUIRE "UNLICENSED SPECTRUM USERS" TO PAY UNSPECIFIED REGULATORY FEES IS CONTRARY TO COMMISSION PRECEDENT AND IS NOT ADMINISTRABLE.

The *Report and Order* accompanying the *Notice* explains the Commission's precedent interpreting and applying Section 9 of the Communications Act. The Commission's methodology must "reflect the full-time equivalent number of employees within the bureaus and offices of the Commission, adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities."[4] Thus, since 2012, the Commission has "assesse[d] the allocation of full-time equivalents (FTEs) . . . in each core bureau" and attributed the FTEs to "payor categories based on the nature of the FTE work" in those bureaus.[5] Even before 2012, the Commission's approach focused on FTE time "spent on

[4] *Report and Order* ¶ 3 (quoting 47 U.S.C. § 159(d)).

[5] *Id.* The Commission explained in the *Report and Order* that this methodology "essentially remains unchanged by" RAY BAUM'S Act. *Id.* ¶ 3 n.10.

regulating specific licensees or regulatees" within the four core bureaus, with time not assignable to "one of the bureau's designated fee categories . . . counted as an indirect FTE."[6]

The Commission's approach, grounded in Section 9's text, serves the Commission's goal of ensuring that its "actions in assessing regulatory fees are fair, administrable, and sustainable."[7] The core bureaus "conduct oversight and regulation of issues that *directly* benefit the fee payors."[8] Accordingly, the Commission is able to consider carefully the "direct FTE burden related to the regulatory fee category at issue" within each bureau,[9] as well as each "regulatee's proportionate share based on an objective measure" within each fee category.[10] Regulated parties are discrete, knowable entities, imposing discrete and well-understood duties on the Commission's core bureaus.

NAB's suggested class of "unlicensed spectrum users,"[11] by contrast, is enormous, diverse, often outside the jurisdiction of the Commission, and impossible to identify with accuracy. Unlicensed spectrum users include consumers, state and local governments, corporations, non-profit organizations, schools, libraries, and many more groups. Those unlicensed spectrum users do *not* impose discrete and well-understood duties on the Commission as licensees and other regulated parties do.

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[6] *Procedures for Assessment and Collection of Regulatory Fees*, Notice of Proposed Rulemaking, 27 FCC Rcd. 8458, ¶¶ 7-8 (2012).

[7] *Report and Order* ¶ 4.

[8] *Id.* ¶ 19.

[9] *Id.* ¶ 17.

[10] *Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Report and Order and Further Notice of Proposed Rulemaking, 34 FCC Rcd. 8189, ¶ 9 (2019).

[11] *See Notice of Proposed Rulemaking* ¶ 73.

Potential beneficiaries of unlicensed spectrum subject to NAB's proposed regulatory fees share little in common other than their use of unlicensed spectrum. Potential regulatory fee payors would include, for example, consumers who use Wi-Fi–enabled devices like baby monitors, garage door openers, televisions, laptops, smart refrigerators; mobile network operators that take advantage of Wi-Fi to offload traffic; and content providers whose programming travels over Wi-Fi. The Commission does not directly regulate those people or entities with respect to their use of unlicensed devices; no license is required for an individual to transmit in unlicensed spectrum. Even with respect to particular devices, "many devices, including those operating wholly or in part on unlicensed spectrum, are exempt from equipment authorization requirements," and "devices that are not exempt" are tested and certified by third party labs and Telecommunications Certification Bodies ("TCBs").[12] The Office of Engineering and Technology ("OET") is most involved in proceedings determining the rules in particular bands (*e.g.*, the very successful U-NII bands) that devices must follow in order to operate on an unlicensed basis. But OET is not a core bureau, and the Commission is correct that much of OET's work on issues such as rules to avoid harmful interference often operates to benefit licensees (including, among others, "broadcast regulatees").[13]

Unlicensed spectrum users, though they are very diverse, share one thing in common that distinguishes them from licensees directly regulated by the Commission—they receive no rights or protections from the FCC. Wireless spectrum licensees receive exclusive rights to particular spectrum frequencies, which they monetize by offering services using that exclusive spectrum. Parties like carriers with Section 214 authorizations similarly receive FCC-regulated rights to

[12] *Report and Order* ¶ 24.

[13] *Id.* ¶ 23 n.65.

offer telecommunications services. Users of devices operating in unlicensed spectrum bands, by contrast, receive no exclusive rights over other parties, and they must accept interference from others. Unlike for licensees, no FCC bureau expends resources processing licensing filings or protecting unlicensed spectrum users against harmful interference from other parties.

Because of the differences between entities currently subject to regulatory fees and unlicensed users (or those who "reap the benefits"[14] of unlicensed spectrum), NAB's proposal raises a host of administrability concerns. For example, how would the Commission define which uses of unlicensed spectrum or benefits from unlicensed spectrum qualify to trigger the application of regulatory fees? Chipmakers, component makers, device makers, device users, broadband internet providers, content providers, mobile network operators, vendors, enterprise users, and consumers all "use" unlicensed spectrum in various ways or "benefit" from its availability. Likewise, how would the Commission identify the particular parties that fall into those categories and determine the extent to which each should pay a regulatory fee? Because the FCC does not directly regulate the majority of these parties regarding their use of unlicensed spectrum, there are no FCC records for most of these users, and collecting identifying information would create daunting privacy, jurisdictional, and Paperwork Reduction Act challenges. How would the Commission collect the fee from users? How would the Commission avoid double payment, even as to particular devices, as the beneficiaries of the device's use of unlicensed spectrum run the gamut from chipmakers, through device manufacturers and retailers, all the way to end users? NAB does not address these questions, but the Commission would have to resolve them to adopt NAB's proposal.

[14] NAB Comments at 13 & n.35.

Whatever the precise boundaries of NAB's proposal, it appears broad enough to include, at a minimum, both manufacturers and users of devices that use unlicensed spectrum as payors of regulatory fees. That would have a sweeping impact on the consumer technology market. For example, it would include CTA members who manufacture smart televisions, as well as their customers who are the "users" of smart televisions. Televisions are one of the most widely owned consumer products, and ownership of internet-enabled televisions is growing rapidly.[15] Almost every smart television includes Wi-Fi chips for accessing a home's broadband connection, as well as for other uses, and some non-internet-enabled televisions use Bluetooth for remotes, speakers, or other accessories. NAB's broad principle would apply similarly in every sector of the consumer technology market that involves Wi-Fi.

Even if NAB were to propose some way of assessing fees only on some particular group or class of unlicensed spectrum users, there would be no non-arbitrary way to implement such an approach consistent with Section 9. Given the diversity of different kinds of unlicensed spectrum users and the interrelatedness of their uses—again, chipmakers, component makers, device makers, vendors, enterprise users, and consumers and other end users—the Commission could not reasonably conclude that a particular group of users must pay fees in order to "reflect the full-time equivalent number of employees within the bureaus and offices of the Commission"[16] (if any) regulating the use of unlicensed spectrum.

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[15] *See* Consumer Technology Association, *23rd Annual U.S. Consumer Technology Ownership & Market Potential Study* 21, 25 (May 2021), *available at* https://shop.cta.tech/collections/research/products/23rd-annual-u-s-consumer-technology-ownership-and-market-potential-study (explaining, for example, that 91% of households own a television, with 71% of households owning a smart television).

[16] 47 U.S.C. § 159(d).

If the Commission were to accept NAB's premise—that all who "derive substantial benefits from [FCC] activity," rather than regulated entities, must pay regulatory fees[17]—this would affect contexts far beyond unlicensed spectrum. For example, if the Commission were to adopt NAB's premise as the fundamental principle for its assessment of regulatory fees, it would result in countless new fee payors, including many just in the radio and television broadcast context. Television viewers and radio listeners derive substantial benefits from the Commission's broadcast and media regulations, for example, as do manufacturers of televisions and radios, local businesses who advertise on broadcast channels, and many more. Likewise, the Wireless Bureau's work on licensed flexible-use spectrum benefits countless people and entities that the Bureau does not directly regulate, such as consumers with mobile plans, device manufacturers with radios to use licensed bands, and so on. It would not be administrable, or otherwise good public policy, to adopt NAB's principle and assess regulatory fees to users and beneficiaries of television, radio, or flexible-use bands. But it would be arbitrary to apply that principle only in some frequency ranges and not in others. The Commission should reject NAB's proposal.

II. NAB'S PROPOSAL WOULD UNDERMINE INNOVATION AND ECONOMIC GROWTH.

Endorsing NAB's proposal would also undermine some of the central benefits of unlicensed spectrum. The foundational principles of the Commission's approach to unlicensed spectrum—low barriers to entry, with spectrum open to all comers who comply with basic technical rules—have produced a diverse ecosystem of applications and devices, the most intensely used frequency bands the Commission oversees, and extraordinary consumer benefits.

[17] NAB Comments at 13.

We have previously observed that unlicensed spectrum "is the fuel that powers innovation and tech entrepreneurship in the 21st century."[18] The Commission's decision to permit unlicensed operations in the 6 GHz band, for example, will empower "innovations such as AR/VR, drones, connected vehicles, telehealth, precision agriculture, and AI."[19] Those diverse applications (and many more) are possible in the 6 GHz band because use of that spectrum on an unlicensed basis is available to all, without a license, and without regulatory fees and associated obligations.

NAB's proposed regulatory fees would hinder innovation, however, by increasing costs and creating regulatory uncertainty. The obligation to pay fees would erect barriers to entry for innovators testing and developing new technologies. A complex and potentially unpredictable fee-collection regime—given the broad universe of devices, users, and beneficiaries of unlicensed spectrum—would make even the amount of such fees unpredictable and uncertain. And the potential for FCC registration requirements to support a fee-collection regime (*e.g.*, requiring individual consumers with home Wi-Fi routers, laptops, smartphones, smart home devices, smart televisions, and other devices to somehow register with the FCC) would impose significant burdens on consumers and enterprises, as well as raising serious privacy concerns. It would almost certainly drive many consumers away from useful devices using unlicensed spectrum.

[18] Letter from CTA to Hon. Ajit Pai, Chairman, FCC, ET Docket No. 18-295, GN Docket No. 17-183, at 2 (filed Jan. 2, 2020).

[19] *Id.* at 3.

III. COMPANIES THAT USE UNLICENSED SPECTRUM ALREADY PAY SUBSTANTIAL SUMS TO DEFRAY COMMISSION COSTS.

NAB describes its proposal as necessary to ensure that "unlicensed spectrum users . . . no longer get a free pass"[20] for the benefits resulting from the Commission's hard work. However, unlicensed spectrum users already defray Commission costs in significant ways that NAB overlooks. First, many companies that use unlicensed spectrum are also FCC licensees who pay regulatory fees based on established FCC rules. For example, companies that have authorizations for submarine cable operations,[21] VoIP providers categorized as Interstate Telecommunications Service Providers,[22] microwave operators,[23] satellite earth station operators,[24] and cable television providers[25] all pay regulatory fees, and many if not all of those companies use unlicensed spectrum in some capacity. Second, as the Commission noted in the *Report and Order*, the FCC adopted rules years ago to require companies that seek equipment certification for unlicensed devices to do so by paying FCC-recognized labs and Telecommunication Certification Bodies ("TCBs") to undertake this work rather than Commission staff, reducing costs and staff burden on the Commission.[26] In 1998, the Commission recognized that an effective way to reduce the burden on Commission staff related to certification was to create this new system, replacing the previous approach under which FCC

[20] NAB Comments at 14.

[21] *See, e.g.*, *Report and Order* ¶ 42 (adopting proposal to use "the same tiers for assessing fees on submarine cable operators" in FY2021 as applied in FY2020).

[22] *See id.* ¶ 31 n.101.

[23] *See id.* App'x C.

[24] *See id.* ¶ 46.

[25] *See id.* App'x C.

[26] *Id.* ¶ 24 n.66.

staff performed the tasks that TCBs perform today.[27] Because of this forward-looking decision, the associated "costs are not borne by the Commission," and thus "are not recovered through regulatory fees."[28] Instead, the "[d]irect costs of device testing and applicant certifications necessary to demonstrate compliance with [the FCC's] technical and equipment authorization rules are paid directly by manufacturers to FCC-recognized labs and TCBs."[29] Companies seeking equipment authorizations, including devices that use technologies like Wi-Fi and transmit in unlicensed spectrum, now pay significant fees to TCBs—often far higher than the annual regulatory fee a broadcaster pays to the FCC. These unlicensed spectrum users thus already substantially defray Commission FTE costs, despite not being directly regulated by a core bureau.

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CTA and its members appreciate the Commission's hard work both on rules governing unlicensed spectrum and on other areas within the Commission's jurisdiction. For all the above reasons, we urge the Commission not to adopt NAB's proposal to upend the current regulatory-fee regime and replace it with one that would be inconsistent with Commission precedent, inadministrable, arbitrary in application, and counter to the FCC's policy of promoting innovation.

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[27] *In the Matter of 1998 Biennial Regulatory Review*, Report and Order, 13 FCC Rcd. 24687, ¶¶ 1, 10, 14, 45 (1998).

[28] *Report and Order* ¶ 24 n.66.

[29] *Id.*

Respectfully submitted,

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